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Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1237

STATE OF NEW YORK,

Petitioner,

v.

UNITED STATES OF AMERICA (relative to the condemnation by the United States of certain easement rights in 220 acres of land in Essex and Hamilton Counties, New York).

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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Attorney for Petitioner.

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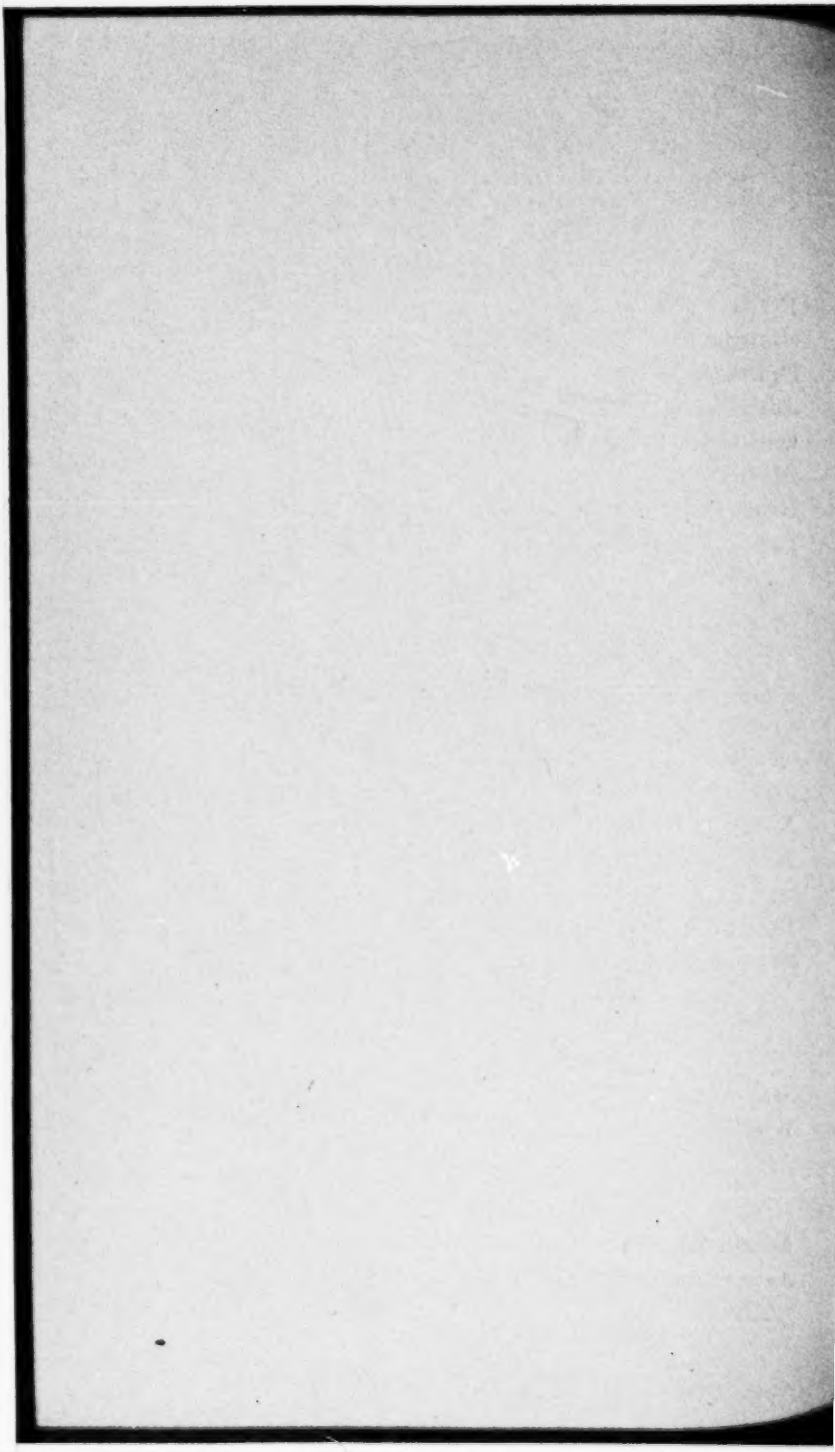

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OCTOBER TERM, 1946.

No. .....

STATE OF NEW YORK,
Petitioner,
v.
UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner above named represented by Nathaniel L. Goldstein, Attorney General of the State of New York, respectfully prays that a writ of certiorari be issued from the Supreme Court of the United States directed to the Circuit Court of Appeals for the Second Circuit commanding that Court to certify for review and determination a transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 121, October Term, 1946, United States of America, petitioner-appellee, v. State of New York, defendant-appellant, and that the judgment of the Circuit Court of Appeals and the judgment of the District Court may be reversed, and that the petitioner may have such other and further relief as may be just and proper.

Statement of the Matter Involved

This suit was brought by the United States in its District Court for the Northern District of New York in November, 1942 to condemn certain easement rights in 228.15 acres of land in Essex and Hamilton Counties. As to 220 acres owned by the State as a part of the Adirondack State Park or forest preserve the prayer of the petition was that the United States acquire an easement to construct, operate and maintain a railroad about thirty miles in length between North Creek and Sanford Lake, New York, "for the duration of the existing emergency and for fifteen years after the termination of the existing emergency either by Act of Congress or by Executive Order".

For reasons to be presented hereinafter, the State opposed the taking for the fifteen year period. It did not and does not oppose the immediate taking or its continuance for the duration of the war emergency.

The petition (R. 33-37) was met by an answer (R. 45-66), and the United States moved for summary judgment (R. 22-29), but no answering affidavit was served, the motion papers having been served on a representative of the State at the beginning of a trial or hearing at which certain testimony was offered on behalf of the State and the United States (R. 67-86, 101-140).

That was on March 18, 1943. About three years later and before final judgment, there having meanwhile been a decision and order by the District Judge granting summary judgment and dismissing the answer and an abortive effort to appeal from the order, a motion was made by the State to reopen the action and offer newly discovered evidence (R. 140-157), which motion was denied (R. 157-162).

The State's compensation for the condemnation was stipulated so that a final judgment could be entered, without prejudice to the State's contentions that the taking was excessive in duration (R. 162-165), final judgment was entered (R. 6-9), and the State appealed to the Circuit Court of Appeals (R. 3-5). The Circuit Court of Appeals affirmed, the majority opinion being by Judge Clark, Judge Swan concurring, and a dissenting opinion being written by Judge Learned Hand.

Opinions Below

The opinions of the District Court (R. 86-91, 157-160) are unreported. The opinions of the Circuit Court of Appeals, dated February 19, 1947, are thus far unreported, but probably will appear in 159 F. 2d.

Jurisdiction

The judgment (formerly called "order for mandate") of the Circuit Court of Appeals was entered on February 19, 1947. The jurisdiction of the Supreme Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. § 347).

Questions Presented

1. Whether, under an Act authorizing the Secretary of War to condemn,

> "any real property, temporary use thereof, or other interest therein * * * that shall be deemed necessary, for military, naval, or other war purposes" (Second War Powers Act of 1942, 56 Stat. 177, 50 U. S. C. § 171-a),

and directing that the proceedings be in accordance with the General Condemnation Act of 1888 (25 Stat. 357, 40 U.

S. C. § 257), the provisions of the last mentioned Act are to be read as conferring additional authority for condemnation, to whatever extent is "necessary and advantageous" for "public uses".

2. Whether a declaration by the Secretary of War on October 30, 1942 (R. 136-137), that it is,

> "necessary and advantageous to the interests of the United States",

that certain interests in lands be acquired for construction of a railroad connection between North Creek and Sanford Lake, New York, which railroad is required,

> "for the transportation of strategic materials vital to the successful prosecution of the war",

and requesting condemnation, under the Second War Powers Act of 1942 aforesaid,

> "for military or other public purposes",

of an easement to construct, operate and maintain a railroad about thirty miles in length over 220 acres of the Adirondack Forest Preserve,

> "for the duration of the existing emergency and for fifteen years after the termination of the existing emergency either by Act of Congress or by Executive Order",

is such a declaration of public use and necessity that the courts cannot examine, relative to the fifteen year period, whether it is necessary for "military or other war purposes", or is in excess of a reasonable liquidation period.

3. Whether, hostilities having ceased, and the period for which the condemnation power under the Second War Powers Act of 1942 was to be in force, and very nearly the life period appointed for the Defense Plant Corporation in which the railroad was vested, it may have been an "arbitrary" act to continue possession and operation of the railroad for the purpose of realizing the most salvage.

Statutes Involved

The Second War Powers Act, of March 27, 1942 (56 Stat. 177, 50 U. S. C. §171-a, War Appendix § 632), referred to by the United States as "the main authority for the institution of this action" (R. 25 at fol. 73; compare, Judge Clark, C.C.A.*), is believed to be the *only* authority for the condemnation. So far as relevant, it provides as follows:

> "The Secretary of War * * * may cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes, such proceedings to be in accordance with the Act of August 1, 1888 (25 Stat. 357), or any other applicable Federal statute, and may dispose of such property or interest therein by sale, lease, or otherwise, in accordance with section 1(b) of the Act of July 2, 1940 (54 Stat. 712)."

The final provision of the 1942 Act (56 Stat. 187, 50 U. S. C. § 645) was that it remain in force only until December 31, 1944, or such earlier time as should be designated by Congress or the President. It has been variously extended (58 Stat. 827, 59 Stat. 658, 60 Stat. 345, Mar. 31, 1947).

In passing, it should be noted that although the petition and other documents refer to the War Purposes Act as last amended in 1918 (40 Stat. 518, 50 U. S. C. § 171, mentioned at R. 136, 139, 33, 29, etc.) with the implication that it gives some authority for present purposes, it applies only to condemnations of property,

> "for construction and operation of plants for the production of nitrate and other compounds and the manufacture of explosives and other munitions of war",

and to other matters even more obviously irrelevant to the

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* Subsequent references to Judge Clark's opinion will be merely "C. C. A." Paging of that opinion in the Record is not available at present.

present case, which is concerned with a railroad for transporting iron ore from mine to railhead.

The General Condemnation Act of August 1, 1888 (25 Stat. 357, 40 U. S. C. § 257), mentioned in the Second War Powers Act of 1942 with the phrase, "such proceedings to be in accordance with", provides as follows:

> "In every case in which the Secretary of the Treasury or any other officer of the Government has been or shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so."

Subsequent language confers jurisdiction upon the District Courts, etc. It should be noted that the "necessary or advantageous" phrase is not descriptive of the procuring of the real estate, which must find its own authority elsewhere than in this Act, but defines the occasion for using the particular procedure created in 1888.

The provision of the National Defense Act of July 2, 1940, to which the Second War Powers Act of 1942 referred relative to disposition of property condemned, as previously quoted, authorizes the Secretary of War to dispose of such property by methods broadly defined, "when he deems it necessary in the interest of the national defense" (54 Stat. 712, 50 U. S. C. § 1171, subd. b). This power expires not more than six months after the war (56 Stat. 317, 50 U. S. C. §§ 773, 776).

The State's answer adduced the facts, unnoticed by the petition, that the land in question is part of the Adirondack Forest Preserve, placed under special restrictions so far as the State is concerned by its Constitution, and was acquired by the Secretary of War for the Defense Plant Corporation, which is limited in active duration to 1947 (form-

erly January 22, now June 30) and which leased the railroad to National Lead Company until thirty days after termination of the unlimited emergency (R. 48-50, 59). Accordingly, the following provisions are relevant:

New York State Constitution, Art. XIV, § 1.

> "The lands of the state now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed."*

The portion of the Reconstruction Finance Corporation Act under which the Defense Plant Corporation was created (55 Stat. 249-250, 15 U. S. C. § 606-b, subd. 3) provides:

> "No corporation heretofore or hereafter created or organized by the [Reconstruction Finance] Corporation pursuant to this subsection shall have succession beyond June 30, 1947 [formerly January 22, 1947], except for purposes of liquidation, unless the life of such corporation is extended beyond such date pursuant to an Act of Congress."

Reasons Relied on for Allowance of the Writ

A.

It is submitted that the Secretary of War misapprehended the measure of his authority for the condemnation

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* The provision prevents the State from authorizing a railroad through the forest preserve (*People* v. *Adirondack Railway Co.*, 160 N. Y. 225; see also *Adirondack Railway Co.* v. *Indian River Co.*, 27 App. Div. 326) or building a bobsled run (*Assn. Protection Adirondacks* v. *MacDonald*, 253 N. Y. 234), and constitutional amendments were necessary to permit the State to construct highways and ski trails.

The State freely consents to the taking of its lands by the United States in time of war or national emergency, with the necessary exception: "except those the alienation of which is prohibited by the constitution of the state of New York" (State Law § 51, as amended by L. 1941, c. 670).

now involved, and that the courts below followed him in his error. His letter of authorization uses the phrases "necessary and advantageous" and "for military or other public purposes" (R. 136). The first phrase is from the General Condemnation Act of 1888, which also suggests the second in its phrase "for other public uses". It is plain upon the face of the 1888 Act, and upon the face of the Second War Powers Act of 1942, that the language of the latter Act, authorizing condemnation of real property "that may be deemed necessary, for military, naval, or other war purposes", gains nothing, so far as concerns scope of authority for condemnation under the 1942 Act, from the 1888 Act.

To weigh the defenses urged by the State it is necessary that the authority of the Secretary of War be defined exactly according to the applicable statutory language. It is apparent from the phrases that he used that he erred, an error repeated in the petition (R. 33-37, paragraphs 1, 2, 4, 8), and the courts below fell into the same error. Although Judge Bryant referred to the taking as for "war purposes" (R. 90, fol. 270), his views as to the breadth and finality of the discretion vested in the Secretary were probably influenced by the error mentioned. Judge Brennan supposed that the issue was whether the property was taken for "a private rather than a public use" (R. 159, fols. 476-477). The opinion of Judge Clark, in which Judge Swan concurred, makes the same assumption and concludes that the challenged taking was "a legitimate public use", a "public purpose", or a "public aim."

This loose generality in statement of the issue, following the error of the Secretary of War in stating his exact statutory powers, makes it impossible, either that the Secretary was guided by the true measure of his powers in making his

determination, or that the courts below judged truly between him and the State. The importance of this question of statutory interpretation, to other cases as well as the present one, is apparent.

B.

The opinions of the Circuit Court of Appeals suggest some doubt, since *United States ex rel. Tennessee Valley Authority* v. *Welch*, 327 U. S. 546, as to whether it is still a judicial function to determine whether property is taken for a public use. The importance of this question needs no argument.

In the present case the judicial abnegation of the courts below was more extreme than would have been a refusal to review judicially a legislative or administrative determination that a certain purpose for taking property is a public purpose, or that the scope of the taking measured by property or duration was justifiable by that public purpose. They failed to test the scope of administrative discretion by its specific statutory authority. Confronted with an administrative declaration that was indefinite as to the public purposes invoked, and hence as to the necessity relative to any specific public purpose of taking for the second of two periods mentioned, it being apparent that the two periods probably were determined by different purposes, the courts below denied any judicial function to ascertain more definitely the actual relationship between the taking and a specific public purpose. Citing *United States* v. *Meyer*, 113 Fed. 2d 387, for the proposition that they could not "question" the Secretary's determination (R. 90-91, C.C.A.), they refused to permit the State to give definiteness from other sources to an indefinite declaration.

C.

The decision below involves two attempts by the State to challenge the taking for the fifteen year period, and it is the second of those which is the basis of Judge Learned Hand's dissenting opinion and of the third question stated herein. That is, even if the courts below saw no basis for the State's defenses to the taking in 1942, they should have been more receptive to those presented by the motion to reopen in 1946. Not only did that motion offer new evidence*, but it offered it in a new factual setting, open to judicial notice. Hostilities were at an end, so was the period for which the power of condemnation under the Second War Powers Act of 1942 was to be in force, the Defense Plant Corporation was to be divested of its active powers in early 1947, and its lease of the railroad to National Lead Company was to expire only thirty days after the beginning of the fifteen year period. Assuming that the powers of the Secretary of War were appropriately exercised in 1942, not only to take the railroad site for the war emergency period but also for a reasonable period thereafter for salvage and liquidation purposes, the courts below should have entertained the inquiry proposed by the motion in 1946, as to whether the fifteen year period was excessive and "arbitrary".

BRIEF SUPPORTING PETITION

It is submitted that the three questions presented herein are matters of constitutional right, whether the United States derives its power of condemnation, undiscovered until 1875, by implication from necessity or from the Fifth

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* The new evidence was summarized in the majority opinion of the Circuit Court of Appeals as, "an offer, hardly shown to be clear cut, of the premises for disposal as surplus property after the close of hostilities."

Amendment (see *Kohl* v. *United States*, 91 U. S. 367, 371-372). It would be strange if a Government power is to be implied as a matter of constitutional law from the necessity for it, but that there can be no judicial inquiry whether it is necessary in particular instances, or whether the necessity covers the entire taking, in amount or duration. The opposite conclusion seems to be supported by such cases as *Brown* v. *United States*, 263 U. S. 78; *Old Dominion Land Co.* v. *United States*, 269 U. S. 55; *Cincinnati* v. *Vester*, 281 U S. 439; and *United States ex rel. T. V. A.* v. *Welch*, 327 U. S. 546. Opinions may vary as to the degree of deference due to a legislative or an administrative determination of public purpose or of necessity, but the question is never withdrawn completely from judicial cognizance.

In the present case there is no legislative determination that any public purpose of the United States requires specific property to be taken, or that if property is taken for the principal purpose some may be taken for incidental purposes. In this respect the present case is distinguishable from the *Brown*, *Old Dominion*, and *Welch* cases, mentioned above. The Act now involved, instead of conferring an authority upon the Secretary of War in the language, "as he may deem necessary", such as was involved in *United States* v. *Carmack*, 329 U. S. . . . ., and numerous other cases, uses the impersonal phrase, "that shall be deemed necessary". The implication from this unusual congressional language is that the determination of necessity is not vested finally in the Secretary.

The courts below held that the question was solely for the Secretary (R. 90-91, 160), or "that the scope of judicial review is decidedly limited in any event" (C.C.A.) to such an extent that "all these considerations are legiti-

mate ones for the Secretary, and not for the courts" (C. C.A.). For present purposes there does not appear to be any difference between the positions of the District Court and of the Circuit Court of Appeals majority. Each has failed to test the action of the Secretary of War against its exact statutory authority, to go behind an indefinite declaration of authority to learn its definite basis, or otherwise to find anything for judicial consideration in the defenses pleaded by the State.

Prior to 1875 it seems to have been accepted that the United States had no power of eminent domain except in the territories (*Pollard's Lessee* v. *Hagan*, 44 U. S. 212, 223) but it could use the eminent domain power of a State to acquire lands within its borders (7 Op. A. G. 114, 1855; 8 Op. A. G. 31, 1856; 8 Op. A. G. 333, 1857; 10 Op. A. G. 18, 1861; 12 Op. A. G. 173, 1867). An instance in New York in 1847 was *United States* v. *Dumplin Island*, 1 Barb. 24.

In 1879, following decision of the *Kohl* case and referring to it, the Attorney General of the United States ruled that condemnation under the newly discovered Federal power of eminent domain required express authority by Congress (16 Op. A. G. 369, at p. 371). He said the same in 1886 (18 Op. A. G. 327, 341-342).

The General Condemnation Act of August 1, 1888 (25 Stat. 357, 40 U. S. C. § 257) was thereupon enacted. It assumed the existence in the Secretary of the Treasury and other officers, from time to time, of an authority to procure real estate for public buildings or other public uses, and for such cases provided:

> "he shall be authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so."

The limited purpose of the bill was not only clear upon its face, but was shown in a House Report upon the bill from the Committee on Public Buildings and Grounds, and in a statement on its behalf by its sponsor upon passage in the House. The House Report was dated February 14, 1888 (H. R. 409, 50th Cong., 1st Sess., Ser. Vol. 2599) and said concerning the bill:

> "This bill is designed to give the option of condemnation of sites for public buildings, in case where the Government can not acquire on reasonable terms by contract. The words used in acts for public buildings have usually been the words 'purchase or otherwise provide'; and under these words it is the opinion of the Attorney General that condemnation proceedings are not authorized."

A week later, when the bill was about to be passed in the House, Congressman Dibble, introducer of the bill and chairman of the committee which reported it, said (Cong. Rec. p. 1387):

> "This bill as amended proposes simply to give to the Secretary of the Treasury*, by a general enactment, authority which has in some particular bills been omitted; and it also proposes to extend to the district courts the jurisdiction which the Supreme Court has already decided is possessed by the circuit courts under the judiciary act."

Sometimes references have been made to the General Condemnation Act of 1888 which may be understood as suggesting that it gives an independent power of condemnation, or adds something to authority elsewhere conferred. See *Hanson Lumber Co.* v. *United States,* 261 U. S. 581, 585, 587, and *United States* v. *Carmack,* 329 U. S. ...., 91 L. ed. 165, 168. It seems clear that this is not generally so.

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* The words "or any other officer of the Government" were added to the bill by a subsequent amendment, also language applicable to other cases than sites for public buildings.

But if it were generally so, a different intent appears as to the authority conferred by the Second War Powers Act of 1942 (56 Stat. 177, 50 U. S. C. § 171-a). That contains its own specific measure of authority to condemn, and refers to the 1888 Act with the phrase, "such proceedings to be in accordance with". The legislative intent as to the limited relationship between the two acts is clearly expressed. Although nothing very pertinent has been found in the committee reports upon the bill (77th Cong., 2d Sess., S. Rep. 989, Ser. Vol. 10656; H. R. 1765, Ser. Vol. 10661) or the conference reports or over a hundred pages of discussion in the Congressional Record, the general tendency of this material is that Congress was conscious it was conferring extraordinary powers upon the President and the executive departments, and intended them to expire automatically at a specific time and to be otherwise limited.

It seems clear, in the light of the language and legislative history of the two acts, that the Secretary of War erred in declaring his authority to condemn in phrases derived from the 1888 Act, that it was "necessary and advantageous to the interests of the United States", "for military or other public purposes" (R. 136), to take the railroad site for the two periods specified. His declaration should have been that it was "deemed necessary, for war purposes". The declaration made, being broader than the authority possessed, leads to a presumption that the taking was not measured by the appropriate authority.

This court has always insisted upon clear findings of jurisdictional facts. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 431-433; *United States* v. *B. & O. R. Co.,* 293 U. S. 454, 462-465; *Morgan* v. *United States,* 298 U. S. 468, 480; *United States* v. *Rock Royal Co-op.,* 307 U. S. 533, 576; *H. P. Hood & Sons* v. *United States,* 307 U. S. 588, 592-593, 595-

596; *Yonkers* v. *United States,* 320 U. S. 685, 690-692. Applicable to the present case are its words in *Florida* v. *United States,* 282 U. S. 194, 211-212:

> "The question in the present cases, then, is not one of authority, but of its appropriate exercise. The propriety of the exertion of the authority must be tested by its relation to the purpose of the grant and with suitable regard to the principle that whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear."

The courts below should at least have recognized that the Secretary's declaration was inexact and indefinite in its relationship to the true measure of his authority, and for this reason, if no other, it was not prohibitive of judicial examination. They should at least have permitted the State to refer to materials other than the Secretary's declaration to make definite the inexactly declared purposes of condemnation.

That would open the door to the defenses offered by the State. Among them, the alternatives open to National Lead Company for transportation of its iron ore in times of peace (R. 78); the lease of the proposed railroad, four months before the condemnation, from Defense Plant Corporation to National Lead Company, expiring thirty days after expiration of the war emergency period (R. 46-47, 52-66); the fixed and already expired period for exercise of the condemnation power under the Second War Powers Act (R. 49, fol. 147), not as a hard and fast limitation upon the estate that could be taken but as a reason for examining more critically a taking beyond the limited period; the limited life period of Defense Plant Corporation (R. 50, fol. 149) for like reason; and the explanation of the fifteen year period of taking made contemporaneously with the

condemnation on behalf of Defense Plant Corporation to Senator Wagner:

> "We are proceeding on the basis of requesting an easement to extend only 15 years after the emergency. The reason for this term of easement is to prevent the Government from being forced to sacrifice its investment without an opportunity of working out a proper liquidation." (R. 135.)

Add to those facts, and the special interests of the people of the State of New York in the property condemned as exemplified in the State Constitution, the new facts offered in 1946 in the new factual setting of the post-hostilities period, the offer of this railroad as surplus (R. 152, fols. 455-456), even if reconsidered (R. 156-157), thus confirming the earlier indications as to the salvage purpose which determined the fifteen year period.

An anticipated answer to all the State's arguments (and a somewhat superficial one, it is submitted) is that the United States could have taken the fee for the railroad, thus avoiding any question as to whether the fifteen year period was appropriately related to salvage needs. For present purposes it should be sufficient to say: First, whatever was taken there should have been a definite declaration of purpose and necessity. Second, perhaps taking the fee and disposing of it as war surplus would be excessively thrifty, under all the circumstances, and unworthy of the Government. Third, probably it would be impractical. Probably no private bidder would give much beyond quick salvage value for a railroad right-of-way which would be exposed immediately to the eminent domain power of the State for return to its Forest Preserve.

The argument of this petition and brief accepts what was done in 1787 and 1789 to create a federalized government with powers defined by a written constitution. It

assumes general acceptance of the ideal expressed in the phrase, a government of laws and not of men. Without such acceptance, there is so little in common that constitutional argument is impossible. The doctrine of the supremacy of the United States in its constitutional powers means that they must be kept within some orderly limits, or they swallow up all and there is an end of constitutional law as it has been known in the United States.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari in the instant case should be granted, and that the three questions hereinbefore stated should be argued and decided.

Albany, April 7, 1947.

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CITATIONS

742293—47

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1237

STATE OF NEW YORK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the district court (R. 86–91, 157–160) are unreported. The opinions of the Circuit Court of Appeals (R. 168–173) are not as yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 19, 1947 (R. 174). The petition for a writ of certiorari was filed on April 12, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Secretary of War was authorized by Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177, 50 U. S. C. Supp. V, sec. 171a, to acquire an easement in lands for a period terminating fifteen years after termination of the national war emergency.

2. Whether both courts below erred in concluding that the Secretary's determination to take such an interest was not arbitrary or capricious and, hence, was not subject to judicial review.

STATUTES INVOLVED

Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177, 50 U. S. C., Supp. V, 171a, reads as follows:

* * * * *

> The Secretary of War, the Secretary of the Navy, or any other officer, board, commission, or governmental corporation authorized by the President, may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes, such proceedings to be in accordance with the Act of August 1, 1888 (25 Stat. 357), or any other applicable Federal statute, and may dispose of such prop-

erty or interest therein by sale, lease, or otherwise, in accordance with section 1 (b) of the Act of July 2, 1940 (54 Stat. 712). Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, and improved for the purposes of this Act, notwithstanding any other law. Property acquired by purchase, donation, or other means of transfer may be occupied, used, and improved, for the purposes of this section prior to the approval of title by the Attorney General as required by section 355 of the Revised Statutes, as amended.

STATEMENT

On October 30, 1942, the Secretary of War requested the institution of proceedings under the Second War Powers Act[1] to condemn a right-of-way for the construction of a railroad connection between Sanford Lake, New York, and the terminus of the Delaware and Hudson Railroad Corporation at North Creek, New York, the Secretary stating that the acquisition was necessary "for the transportation of strategic materials vital to the successful prosecution of the war" (R. 136–137). The Secretary determined that the interest necessary to be taken in so much of the

[1] Act of August 18, 1890, c. 797, 26 Stat. 316, as amended by the Acts of July 2, 1917, c. 35, 40 Stat. 241, April 11, 1918, c. 51, 40 Stat. 518, 50 U. S. C. 171, and March 27, 1942, c. 199, 56 Stat. 177, 50 U. S. C., Supp. V, 171a.

lands as belonged to New York State was a temporary easement "for the duration of the existing emergency and for fifteen years after the termination of the existing emergency either by Act of Congress or by Executive Order." As to lands privately owned, however, a perpetual easement without time limitation was sought (R. 34, 35). The Government on November 9, 1942, filed its petition to acquire such interest in the lands of petitioner, duly setting forth the determination of the Secretary of War and the purposes for which the interest was being taken (R. 33–38). On the same day, an order of immediate possession was entered (R. 42–44).

Petitioner, by amended answer filed March 18, 1943 (R. 45–52), alleged that the railroad was to be constructed by the Defense Plant Corporation, an instrumentality of the United States, and that under the terms of an agreement between that corporation, the National Lead Company, and the Delaware and Hudson Railroad Corporation, the National Lead Company was to construct the line for the Defense Plant Corporation, title to the railroad to be in the corporation, and the property to be leased by the corporation to the National Lead Company for a period ending in any event thirty days after the termination of the national emergency as determined by either the President or the Congress of the United States. It was further alleged, upon information and belief, that the purpose of the United States in taking for the

period following the emergency was to amortize and liquidate its investment. Petitioner further alleged that the taking was expressly for war purposes, that the powers conferred by the Second War Powers Act were temporary in character, and that the taking for any period beyond the duration of the emergency was a taking for a private purpose, was violative of a section of the New York Constitution forbidding lease, sale, exchange, or other disposition of the forest lands of the State, and was unreasonable and arbitrary. Petitioner's answer did not question that the taking of an easement for the duration of the emergency was for a public purpose and valid, and the sole prayer of the answer was to have the easement limited to the duration of such emergency.

On March 18, 1943, the Government filed its motion for summary judgment condemning the property as prayed in its petition (R. 22–23). An affidavit in support of said motion set forth the exact determination by the Secretary of War of the interest necessary to be taken, averred that under the Second War Powers Act it was for him to determine such matters, that the State's answer did not charge the Secretary with bad faith in making such determination, that his determination is not subject to judicial control, and that the amended answer presented no real or substantial defense to the action (R. 23–28).

Hearing was had on the Government's motion, at which time petitioner was permitted to introduce in evidence a copy of a letter dated October 29, 1942, in which Mr. John W. Snyder, then Executive Vice-President of the Defense Plant Corporation, advised Senator Wagner that the reason for taking an easement extending fifteen years after the emergency was "to prevent the Government from being forced to sacrifice its investment without an opportunity of working out a proper liquidation" (R. 135). On January 28, 1944, the district court (Honorable Frederick H. Bryant presiding) rendered its opinion sustaining the Government's motion for summary judgment (R. 86–91) and on February 25, 1944, that court entered a decree sustaining the right to condemn (R. 29–31). Petitioner thereafter took an appeal from this decree which was dismissed by the Circuit Court of Appeals since the order was not final and appealable (R. 2).

On March 26, 1946, petitioned filed a motion to reopen the action on the ground of newly discovered evidence. As exhibits to this motion petitioner filed copies of portions of an "Advance Listing" of Government-owned Industrial Plants issued in August, 1945, by the Reconstruction Finance Corporation (R. 140–156). This listing included the railroad property for which the easement here in question was acquired. Also filed as an exhibit was a letter from Mr.

Harold E. Jacobson, counsel for the Loan Agency of the Reconstruction Finance Corporation, dated March 13, 1946, advising counsel for petitioner that as of two days before the letter was written the property in question had not been declared surplus property and was not for sale (R. 156–157).[2] On May 29, 1946, the court (Honorable Stephen W. Brennan presiding) rendered its opinion denying the motion to reopen, and an order in accordance therewith was entered on June 10, 1946 (R. 158–162).

Upon the issue of value, which remained to be determined, the parties stipulated that just compensation was the sum of $11,700.00 (R. 162–165). Final judgment of condemnation fixing compensation in this amount was entered on June 29, 1946 (R. 6–9), from which petitioner appealed.

The Circuit Court of Appeals, one judge dissenting, affirmed. That court held (R. 170–172) that there was clear statutory authority for the taking. The court held that judicial review of the Secretary's determination of necessity was limited, at most, to an inquiry as to whether that official's action was arbitrary, capricious or in bad faith. With regard to the taking of an in-

[2] The listing plainly stated that "*With a few exceptions* they [the listed properties] are or will be available for peacetime industrial or other uses." (R. 148, italics supplied.) Such listing is thus not an offer to sell the railroad, nor does it establish that the particular property has been declared surplus.

terest extending beyond the duration of the war, the court noted (R. 171) petitioner's concession that the taking for the duration of the national emergency was proper, held that it could not pronounce the Secretary's action arbitrary or capricious, and that the economic aspects of the project were proper factors for the Secretary to consider in making his determination. In a dissenting opinion (R. 172–173) Judge Learned Hand agreed with the judgment of the trial court in 1944 sustaining the taking. However, he believed that the question was different after the cessation of hostilities and was of the view that the cause should be remanded apparently for the purpose of weighing the relative economic interests of the Government and petitioner.

ARGUMENT

1. There can be no question of constitutional authority of the United States to take the easement here condemned for the public purpose of prosecuting the war. It is equally clear that in execution of that purpose consideration may be given to the recoupment of the investment made by the Government in improvements. *Old Dominion Co.* v. *United States,* 269 U. S. 55; *United States* v. *Forbes,* 259 Fed. 585 (M. D. Ala.) affirmed, 268 Fed. 273 (C. C. A. 5). In *United States ex rel. T. V. A.* v. *Welch,* 327 U. S. 546, this Court sustained a taking of lands not

actually within the flood area of a dam and reservoir project. The fact was that economic savings motivated the taking of such lands, and this Court stated that "T. V. A. was not supposed to waste the money of the United States" (327 U. S. at p. 549) and that "The cost of public projects is a relevant element in all of them, and the Government, just as anyone else, is not required to proceed oblivious to elements of cost" (327 U. S. at p. 554). The constitutional power of the federal government is not limited by the fact that the land needed for public purposes is owned by a State or a subdivision thereof rather than private persons. *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508, 534; *United States* v. *Carmack*, 329 U. S. 230. It is thus apparent that the United States could constitutionally condemn fee title or any lesser interest in the lands of petitioner.

2. The discretion to exercise such authority was delegated to the Secretary of War and other officers. Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 117, 50 U. S. C., Supp. V, 171a (p. 2, *supra*) authorizes the Secretary of War and other Government officers to "acquire by condemnation, any real property, temporary use thereof, or other interest therein * * * that shall be deemed necessary, for military, naval, or other war purposes." Petitioner's argument that a taking for a period beyond the

actual existence of hostilities is not authorized is based upon the fact that the Second War Powers Act was limited in its life (Pet. 5, 14). But that restriction did not limit the duration of the property interest which might be taken. As the court below observed (R. 170), petitioner conceded that the statute authorized the taking of a fee. In effect petitioner repeats that concession here (Pet. 16). Such takings of interests extending beyond the war period have been uniformly upheld. *United States* v. *243.22 Acres of Land,* 129 F. 2d 678 (C. C. A. 2), certiorari denied *sub nom. Lambert* v. *United States,* 317 U. S. 698; *United States* v. *Marin,* 136 F. 2d 388 (C. C. A. 9); *United States* v. *Kansas City, Kansas,* 159 F. 2d 125 (C. C. A. 10).

3. The only question remaining is whether the Secretary of War properly exercised the authority delegated to him. Here the Secretary of War, in unequivocal terms (R. 136–137), determined that it was "necessary and advantageous" to acquire a temporary easement over petitioner's lands "for the duration of the existing emergency and for fifteen years after the termination of the existing emergency either by Act of Congress or by Executive Order," and he stated the public purpose as being "for the transportation of strategic materials vital to the successful prosecution of the war." The argument (Pet. 12–15) that the Secretary sought to exceed the authority dele-

gated to him because he used the above-quoted language rather than the precise phrasing of the Second War Powers Act plainly lacks merit. Cf. *Old Dominion Co.* v. *United States,* 269 U. S. 55, 66–67. As the Circuit Court of Appeals noted (R. 169), petitioner has conceded that, so far as the duration of the emergency is concerned, the taking was for a public purpose and the determination of the Secretary is unassailable. By its answer (R. 51–52) petitioner complained only of the taking beyond the period of the emergency.

Petitioner's argument is basically that the taking for the fifteen year period beyond the duration was for the purpose of liquidating the Government's investment. Assuming this, however, it does not establish that the Secretary's action is arbitrary.[3] Since the taking initially was for a public purpose, the Secretary can properly take into account the economic factor in determining the extent of the taking. This economic factor essentially underlies the purpose of Congress in authorizing a fee taking even though the property is taken solely for purposes connected with

[3] That the Secretary actually took into account the interests of the State in preserving these lands is shown by the fact that, although authorized to take a fee simple interest and although the Government condemned a *perpetual* easement over the 8.15 acres of land in private ownership necessary for construction of the road (R. 34, 35), he limited the taking of the State's land to a period terminating fifteen years after the emergency.

the prosecution of the war. Tremendous losses would have resulted during the last war if only an interest for the duration of the war could have been taken in any case. The instant case is no exception, since the construction of thirty miles of railroad involves a heavy investment. As the court below stated (R. 172), "The scrapping of a railroad line after only a few years of operation means almost a total loss of investment."

As we have shown (*supra*, pp. 8–9), such economic factors are relevant considerations in all public projects. Petitioner's contentions have no tendency to show that the Secretary of War was acting arbitrarily, capriciously or in bad faith. Rather, they represent simply a disagreement with the Secretary's conclusion as to the necessity of taking the easement he selected rather than one of shorter duration. But it is not a judicial function to compare the savings to the United States with the injury to local interests and revise the determination of the Secretary of War to reflect the court's view as to the best compromise between those interests. Thus in the instant case, as in *United States* v. *Carmack*, 329 U. S. 230, 243, "it is unnecessary to determine whether or not this selection could have been set aside by the courts as unauthorized by Congress if the designated officials had acted in bad faith or so 'capriciously and arbitrarily' that their action was without adequate determining principle or was unreasoned." What-

ever may be the rule as to action in bad faith or as to arbitrary or capricious action it is generally accepted that the trial court may not simply substitute its judgment for that of the administrative officer to whom the discretion to choose the interest to be taken has been delegated. The conclusion of both courts below (R. 90–91, 160, 171) that the exercise of discretion here was not arbitrary or capricious is plainly correct.

Judge Hand, while dissenting, agreed that the trial court's decision in 1944, wherein Judge Bryant concluded that the Secretary of War had not abused his discretion (R. 90–91), was correct (R. 172). Certainly the fact that the final judgment was entered four years after the Secretary's original determination at a time when hostilities had ceased does not tend to indicate that the Secretary had acted arbitrarily or capriciously. As the trial court held (R. 159–160) the events occurring subsequent to the making of the Secretary's determination, upon which petitioner relies (Pet. 10), are irrelevant. Finally, the suggestion that these were two independent takings (Pet. 9) is contrary to fact. There was a single taking of an easement, reference being made to the existing emergency simply for the purpose of computing the time during which the easement should exist (R. 25–26).

CONCLUSION

The decision below is correct and no conflict of decisions is present. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

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Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1237

STATE OF NEW YORK,

Petitioner,

v.

UNITED STATES OF AMERICA (relative to the condemnation by the United States of certain easement rights in 220 acres of land in Essex and Hamilton Counties, New York).

PETITION FOR REHEARING OF APPLICATION FOR CERTIORARI.

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Attorney General of the State of New York,
Attorney for Petitioner.

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PETITION FOR REHEARING OF APPLICATION FOR CERTIORARI.

The petition for certiorari was denied on June 2, 1947, and this petition for rehearing is filed within twenty-five days thereafter.

Its sole ground is that the Court may have overlooked one of the questions relied upon in the earlier petition. That petition alleged that three questions were presented. The brief for the United States in opposition alleged that only

two questions were presented, ignoring and offering no defense upon the first question presented by the State. The question thus passed was vital to this litigation, and moreover is an important question of statutory interpretation.

As it appears to the State, the United States has conceded (although by silence, and the concession may have escaped the Court's notice) that the power of condemnation asserted and exercised by the Secretary of War was different from the power conferred upon him by Congress. Different, and broader.

His power under the Second War Powers Act was only to condemn what was "deemed necessary, for military, naval or other war purposes". But the power he asserted and exercised was to condemn what was "necessary *and advantageous*", "for military *or other public purposes*". (R. 136-137, emphasis added.) He took lands in the Adirondark State Park for a railroad, for the period of the war, plus a period of fifteen years. The latter is contested. It is a fair presumption that it was deemed by the Secretary merely "advantageous" rather than necessary, and for "public purposes" other than military ones. If so, it was unauthorized by the statutory authority involved.

It has seemed sufficient to the United States, and to the lower courts (and, it may be, to this Court also) that the statutory authority could have been spread over this entire condemnation *if* the Secretary had so declared. That is, if he had declared that the entire condemnation was "deemed necessary, for military, naval or other war purposes", the courts would have accepted that form of declaration by him as demonstrating that the condemnation was under the proper statutory authority.

The fact is, he declared something quite different, the form of which demonstrates that the condemnation was *not* under the statutory authority. It has been thought, in view of the way this question has been obscured in the brief for the United States, that it should be pressed upon the Court's attention by this petition for rehearing, which is most respectfully submitted.

Albany, June 7, 1947.

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Assistant Attorney General,
of Counsel.

I, HENRY S. MANLEY, counsel for the above named petitioner, do hereby certify that the foregoing petition for a rehearing is presented in good faith and not for delay.

HENRY S. MANLEY.